In The

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1014

HOYLE BRUCE BEDELL,

Petitioner,

v.

THE STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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THE STATE OF ARKANSAS,

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The petitioner, HOYLE BRUCE BEDELL, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The first opinion of the Supreme Court of Arkansas is reported at *Bedell v. State,* 257 Ark. 895, 521 S.W.2d 200 (1975), attached hereto as Appendix A.

After a retrial, the case was again appealed to the Arkansas Supreme Court. The opinion is unreported at this time, but is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 20, 1976. Rehearing was denied on October 25, 1976 (attached hereto as Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the marijuana seized from the property of the petitioner with the authority of a search warrant and introduced into evidence was seized in violation of U.S. Const. amend. IV as applied to the States by U.S. Const. amend. XIV?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. XIV, section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The sheriff of Randolph County, Arkansas, received information that marijuana was growing on property owned by Hoyle Bruce Bedell. The property consisted of 306 acres; all but 20-30 acres of the property is heavily forested. On September 29, 1973, the sheriff and his deputy went into the State of Missouri and entered Mr. Bedell's property from the north side. The two law enforcement officers traversed wild, unimproved woodlands,

crossing a barbed wire fence that they supposed to mark the north boundary of Mr. Bedell's property. Approximately a quarter mile from the fence, the officers entered a partially cleared field where one marijuana plant was found. The officers proceeded to a second clearing where seventeen marijuana plants were found. The officers then proceeded past a little thicket and found twenty-seven plants in a third clearing. On October 4, 1973, the officers returned to the property and reaffirmed the presence of the marijuana plants in the three clearings. The marijuana plants were not visible from any public road or the boundaries of the Bedell property.

The officers obtained a search warrant on October 5, 1973. The search warrant was based upon an affidavit of the sheriff relating his observations while on the property. The execution of the search warrant resulted in the seizure of marijuana in Mr. Bedell's house and from the clearings. Mr. Bedell was charged with manufacturing marijuana. Mr. Bedell's motion to suppress the evidence was denied and he was convicted of the charged offense. He appealed to the Supreme Court of Arkansas. On March 31, 1975, the Supreme Court of Arkansas ruled that the prohibition against unreasonable searches and seizures did not extend to open fields and forested areas, citing *Hester v. United States, 265* U.S. 57 (1924). See *Bedell v. State,* 257 Ark. 895, 521 S.W.2d 200 (1975). However, the conviction was reversed because of the failure to give an instruction to the jury requested by the defense.

A second trial was conducted, Mr. Bedell's motion to suppress evidence was again denied, and he was again convicted of manufacturing marijuana. Mr. Bedell raised several grounds of error on the second appeal to the Supreme Court of Arkansas, including the search question. The Supreme Court of Arkansas affirmed on all issues raised, stating on the search issue:

> "Our ruling upon the first appeal, that the prohibition against unreasonable searches and seizures does not extend to open fields and forested areas, has become the law of the case and will not be re-examined. The doctrine known as the law of the case applies to issues of constitutional law. Feldman v. State Board of Law Examiners, 256 Ark. 384, 507 S.W.2d 508 (1974); Miller Lbr. Co. v. Floyd, 69 Ark. 472, 275 S.W. 741 (1925) affirmed, 273 U.S. 672 (1927) . . . If the appellant thought our first decision to be wrong he had the opportunity to seek a review by the United States Supreme Court."

REASONS FOR GRANTING THE WRIT

Mr. Bedell would first note that the failure of the Supreme Court of Arkansas to reconsider the search issue does not bar consideration of the issue by this Court. In *Turner v. Arkansas,* 407 U.S. 366 (1972), this Court reversed a robbery conviction where the Supreme Court of Arkansas had refused to consider a collateral estoppel issue because of the "law of the case," See *Turner v. State,* 251 Ark. 499, 473 S.W.2d 904 (1971) and *Turner v. State,* 248 Ark. 367, 452 S.W.2d 317 (1970).[1]

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[1] Petitioner would also note that the doctrine is based upon the public policy to cause an end to litigation. Miller Lbr. Co. v. Floyd, *supra;* Turner v. State, 251 Ark. 499, 473 S.W.2d 904 (1971). However, the doctrine should not be utilized to accomplish an injustice. Cochran v. M & M Transportation Co., 110 F.2d 519 (1st Cir. 1940); England v. Hospital of the Good Samaritan, 14 Cal.2d 791, 97 P.2d 813 (Cal.Sup.Ct. 1939). Since it is not a limit on the power of the court, Naples v. United States, 359 F.2d 276 (D.C. Cir. 1966); United States v. Fuller, 277 F.Supp. 97 (U.S.D.C. D.C. 1967), it should not be used when compelling circumstances call for a redetermination, particularly where there are intervening or continuing changes in the applicable law. Ryan v. Mike-Ron Corp., 66 Cal. Rptr. 224 (Cal.Ct.App. 1968); CIR v. Netcher, 143 F.2d 484 (7th Cir. 1944).

Other considerations indicating the inapplicability of the doctrine in this case are that it would promote piecemeal litigation, it would be cost prohibitive to criminal defendants to expend funds on discretionary writs knowing that a pending retrial is in the immediate future, and it would add to the already crowded docket of this Court.

It is well settled that searches conducted outside the judicial process without prior approval by a magistrate are *per se* unreasonable, subject only to a few specifically established exceptions. U.S. Const. amends. IV and XIV; *Katz v. United States,* 389 U.S. 347 (1967). The exceptions are jealously and carefully drawn, *Jones v. United States,* 357 U.S. 493 (1958), and there must be a showing by those who seek exemption from the warrant requirement that the exigencies of the situation made the course imperative. *McDonald v. United States,* 335 U.S. 451 (1948).

In the present case, if the first intrusion upon Mr. Bedell's property was the result of an unlawful search, then the marijuana seized as a result of the search warrant issued after the intrusion would be excludable under the "fruit of the poison tree" doctrine. *Wong Sun v. United States,* 371 U.S. 471 (1963); *Silverthorne Lbr. Co. v. United States,* 251 U.S. 385 (1920).

Hester v. United States, 265 U.S. 57 (1925) is often cited for the proposition that contraband seen in "open fields" is not protected by the Fourth Amendment. In *Hester,* officers may have gone onto the defendant's property and observed him give a bottle to a third person. An alarm was then given. The defendant and the third person fled, abandoning two bottles of distilled spirits. This Court held that there was no search since the bottles had been abandoned. The defendant also contended that he had been compelled to give evidence against himself, to which the Court stated:

> "As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."

It is obvious that the "expectation of privacy doctrine"

expressed in *Katz v. United States, supra,* must limit the "open field" doctrine of *Hester v. United States, supra,*[2] In *United States v. Homes,* 521 F.2d 859 (5th Cir. 1975), en banc hearing granted, 525 F.2d 519 (5th Cir. 1976), a panel of the circuit court reversed a marijuana conviction for several reasons, one of which was the trespass upon the defendant's property to observe marijuana stored in a shed. The property involved in *United States v. Holmes, supra,* was similar to the property involved in the present case in that it was secluded. The circuit court held that when a law enforcement officer trespasses solely to unearth evidence of a crime, he has no right to be in the position to have the view. The opinion stated:

> "Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush . . ."

See also *United States v. Davis,* 423 F.2d 975 (5th Cir. 1970).

The balancing between the two doctrines is also distinctly stated in *United States ex rel. Gedko v. Heer,* 406 F.Supp. 609 (W.D. Wis. 1975). In that case officers had knowingly climbed over a fence onto the defendant's wooded and hilly property and overheard certain incriminating conversations. The district court rejected a sterile application of the "open fields" doctrine, and held that *Hester v. United States, supra,* no longer had any independent meaning except insofar as it indicated that "open fields" were not areas in which one traditionally could have expected privacy. The district court held that the factual situation

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[2] See 1 Antieau, Modern Constitutional Law, Sec. 2.8. p. 160, where the "open field" doctrine is criticized.

clearly indicated an "expectation of privacy" from law enforcement officers lurking in the bushes.

Petitioner contends that a person living in a densely wooded area has a reasonable expectation that law enforcement officers will not be climbing his fences and trespassing more than a quarter mile upon his property. A person may not have a reasonable expectation of privacy from observations conducted or conductable from a neighbor's property, cf. *Air Pollution Variance Board v. Western Alfalfa,* 416 U.S. 861 (1974), but such a situation did not exist in this case. The officers made an observation from a place where they had no right to be. These observations invaded the petitioner's reasonable expectation of privacy.

The decision of the Supreme Court of Arkansas is based upon an interpretation of law that is not in accord with the decisions of this Court. Also, the issue has not been precisely determined by this Court. Finally, there appears to be a difference in the circuits and the States as to the current extent of the "open fields" doctrine. Compare *Patler v. Slayton,* 503 F.2d 472 (4th Cir. 1974) with *United States v. Holmes, supra; People v. Abruzzi,* 385 N.Y.S.2d 94 (N.Y. App. 1976) with *Commonwealth v. Trefiz,* 351 A.2d 265 (Penn. Sup.Ct. 1976). See also *People v. Huddleston,* 347 N.E.2d 76 (Ill.App.Ct. 1976) (dissenting opinion of Justice Strouder).

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Hon. William Clinton, Attorney General, Justice Building, Little Rock, Arkansas, 72201, on this 10 day of January, 1977.

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. CR-74-150

Hoyle Bruce Bedell,
Appellant,
v.
State of Arkansas,
Appellee.

Opinion Delivered MAR 31, 1975

Appeal from Randolph Circuit Court, Harrell Simpson, Judge

Reversed and Remanded

CONLEY BYRD, Associate Justice

The appellant, Hoyle Bruce Bedell, was charged by information with the crime of manufacturing marijuana in that he "did unlawfully, wilfully, and feloniously grow and manufacture marijuana (Cannabis sativa L.)." Upon conviction at a jury trial he was sentenced to six years in the penitentiary and fined $3,000.

On appeal to this court Bedell has designated the following points he relies on for reversal:

I. The initial warrantless and unconsented search by government authorities, or ranging, of the defendant's farm lands beyond view from public roads was a trespass, constituting an illegal act which tainted all evidence flowing and resulting from this trespass as 'fruit of the poisonous tree,' and the court erred in overruling defendant's motion to suppress evidence.

II. The subsequent search warrant issued pursuant to the initial warrantless searches was limited to search of the defendant's curtilage and residence, and a warrantless contemporaneous search of the defendant's three hundred six (306) acre farm was unauthorized, and the defendant's fourth amendment right should be recognized to extend to adjacent fenced farm lands contiguous to one's residence.

III. The court erred by fatally prejudicing the jury in admitting evidence regarding defendant's possession and use of marijuana given the present circumstances of the defendant's procedural severance of the charges of (1) manufacturing marijuana and (2) possession of marijuana with intent to deliver, and in view of the court's refusal to give defendant's jury instruction number ten (10).

IV. The court erred in refusing defendant's proposed jury instruction number ten (10) which properly described the scope of the statutory definition of 'manufacture.'"

The facts appear as follows: The appellant owned a 306 acre hill farm in Randolph County and lived in a house adjacent to the highway on the front or east side of the property. Much of the farm was in timber with small cleared areas near the middle of the west or back side of the tract of land. The fields or cleared areas were surrounded by timber with especially heavy timber and underbrush lying north of the cleared areas.

In September, 1973, the sheriff of Randolph County obtained information that marijuana might be growing on the appellant's land so he and one of his deputies entered the tract through heavy timber at the northwest corner of the tract and first found what appeared to be a single marijuana plant growing in a cleared area, referred to in the testimony as field No. 1. The officers returned to the area a few days later and found 17 plants in the second area; 27 plants in a third area, and 76 plants growing in still another cleared area. All the plants were in a state of cultivation with

sawdust and what appeared to be fertilizer having been placed around them. The growing plants were located by following plastic pipes running from what was described as a small holding pond near a newly drilled water well and running to the area where the marijuana plants were found. The officers found the 76 plants in field No. 4 by following a hose which was attached to a pump installed in a dug well or cistern at an old house place on the property. A plastic line also ran from this well in an easterly direction past a sawdust pile at an old sawmill set and then on toward the house where Bedell lived. The sheriff and his deputy confiscated the growing marijuana and preserved it in a black plastic bag, later introduced into evidence as state's exhibit No. 1. The sheriff testified that the marijuana plants were planted or set out in "hills" and that he observed hills in the four cleared areas where no plants were then growing.

On the basis of the information thus obtained, the sheriff obtained a search warrant and he and his deputies searched Mr. Bedell's house where they found a pillowcase containing marijuana; a glass bottle or jar containing marijuana cigarette butts; a plastic box containing marijuana cigarette butts, and a paper bag containing marijuana. These items, together with the plants taken from the fields, were introduced into evidence.

POINTS I & II. We agree with the state that the Fourth Amendment to the Constitution only protects against *unreasonable* searches and seizures of persons, houses, papers and effects and does not extend to open fields and forested areas. See *Hester v. United States,* 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924). Consequently we find no merit in points I & II.

POINTS III & IV. The appellant's third assignment, as designated, also includes his fourth assignment. We find no merit

to the first part of the appellant's third assignment. We gather from the argument in appellant's brief that he may have been charged in a separate case with possession of marijuana with the intent to deliver, but there is no evidence that the jury was made aware of such additional charge. The appellant was being tried on the charge of manufacturing marijuana. The 121 growing marijuana plants were discovered in, and obtained from, fields on the appellant's land some distance from the house where he lived and, there was testimony indicating that the fields contained numerous hills where plants had been set or grown. The marijuana plants were all surrounded by sawdust and a large sawdust pile was located near the center of appellant's tract of land. A new well had been drilled on the back side of the appellant's property with plastic pipe running to the area where marijuana plants were being cultivated. A gasoline pump with hose connected was found installed in a well or cistern on appellant's property. The hose from the pump ran to the area where the 76 marijuana plants were located, and a hardware merchant from Missouri testified that he sold the pump to the appellant. A filling station operator and gasoline motor mechanic from Missouri testified that he repaired the pump for the appellant. The sheriff testified, under cross-examination by the appellant's attorney, that it was his understanding the appellant had not lived on his property but a few months. So we conclude that the marijuana found in the appellant's house was strong circumstantial evidence that it was he who was growing the marijuana being cultivated on his farm and that it was admissible in evidence for that purpose.

We now come to the trial court's refusal to give appellant's Instruction #10. The Uniform Controled Substances Act, Ark. Stat. Ann. §§ 82-2601—82-2638 (Supp. 1973), is an overall Act

pertaining to all of the many controlled substances including marijuana. Section 82-2601 (m) reads as follows:

> "(m) 'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, *except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use* or the preparation, compounding, packaging, or labeling of a controlled substance:
>
> (1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of professional practice; or
>
> (2) by a practitioner or by his authorized agent under his supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." [Emphasis ours].

The trial court instructed the jury in part as follows:

> "6. The law defines 'manufacture' to mean the production, including the planting, cultivating, growing or harvesting of a controlled substance, *preparation,* propagation, conversion or *processing* of a controlled substance." [Emphasis ours].
>
> "7. Manufacture means the production, *preparation,* propagation, conversion or *processing* of a controlled substance either directly or indirectly by extraction from substances of natural origin or depending by means of chemical synthesis, *and includes any packaging or repackaging of the substance,* or the labeling or relabeling of it, and it does include the growing or the cultivating of it." [Emphasis ours].

The appellant's requested Instruction No. 10 which was refused by the court reads as follows:

> "10. You are hereby instructed that Manufacturing Marihuana means to grow, to produce, to cultivate, to propagate or to harvest marihuana, either directly by natural agricultural production or indirectly or independently, by means of chemical synthesis, and specifically excludes a practitioner or his agent preparing, compounding, packaging, prescribing, dispensing, ordering, or analyzing marihuana in the course of his professional practice, *and also specifically excludes the preparation or compounding of the controlled substance of marihuana by an individual for his own use.*" [Emphasis ours].

Obviously the exception in the definition of manufacture as to "the preparation or compounding of a controlled substance by an individual for his own use" was placed in the act because one's use of a controlled substance is only a misdemeanor whereas possession for any other purpose is a felony.

The evidence from which a jury might have drawn an inference that Bedell had prepared *or* compounded marijuana for his own use came primarily from the sheriff and his deputy. The found: a pillowcase containing marijuana in the closet in the southwest bedroom of his home; a glass jar and a plastic box, both containing marijuana cigarette butts (the cigarettes had been smoked) under Bedell's bed; and a paper sack containing marijuana on a bedroom closet shelf. The fact that there were cigarette butts in some containers along with the loose marijuana in others certainly constituted evidence that would justify a belief that Bedell had "prepared" marijuana. When considered in the light of the fact that the cigarettes had been smoked, the inference that Bedell had prepared marijuana for his own use was certainly reasonable.

The jury found Bedell guilty of manufacturing marijuana. It had been instructed that "manufacture" included "preparation" or "processing". It had also been instructed that "manufacture" means production, preparation, propagation, conversion or processing and includes any packaging or repackaging of the substance. It was not told that preparation of the substance by an individual for his own use is specifically excluded.

Since there was evidence that Bedell had prepared marijuana for his own use, the jury should have been told that this did not constitute manufacture. Consequently, the trial court erred in refusing appellant's requested Instruction #10.

Reversed and remanded for the error indicated.

Harris, C.J., George Rose Smith and Jones, JJ. dissent.

DISSENTING OPINION

J. FRED JONES, Associate Justice

I do not agree with the majority opinion in this case. It is my opinion the trial court did not err in refusing to give the appellant's instruction No. 10.

As pointed out in the majority opinion, the Uniform Controlled Substances Act, Ark. Stat. Ann. §§ 82-2601—82-2638 (Supp. 1973), is an overall Act pertaining to all of the many controlled substances including marijuana. As I read § 82-2601 (m) its interpretation is plain. "Manufacture" means either the production, the preparation, the propagation, the compounding, the conversion or the processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a

combination of extraction, etc. The controlled substance is the object of the manufacture by any one or combination of these processes.

I am unable to read from the evidence in this case that the appellant was engaged in the manufacture of a controlled substance through the process of preparation or compounding. The controlled substance, marijuana. is a plant and is simply not manufactured by preparation or compounding. It is manufactured by production and Ark. Stat. Ann § 82-2601 (u) (Supp. 1973) states: "'Production' includes the manufacture, planting, cultivation, growing or harvesting of a controleld substance." That was what the appellant was charged with and was convicted of. The exception set out in § 82-2601 (m) "except that the term [manufacture] does not include the *preparation or compounding of a controlled substance by an individual for his own use* . . ." (emphasis added) simply does not apply to growing marijuana.

Bedell was not charged in this case with the possession of marijuana for any purpose. The evidence that he even possessed marijuana inside his home was offered for the purpose, and the sole purpose, of showing his connection with the marijuana that was still growing in, and had been harvested from, his fields. My main reason for dissent in this case is stated by the majority as reason for their reversal. The majority opinion says:

> "The evidence from which a jury might have drawn an inference that Bedell had prepared *or* compounded marijuana for his own use came primarily from the sheriff and his deputy. They found: a pillowcase containing marijuana in the closet in the southwest bedroom of his home; a glass jar and a plastic box, both containing marijuana cigarette butts (The cigarettes had been smoked) under Bedell's bed; and a paper sack containing marijuana on a bedroom closet shelf."

The majority then say that the fact there were cigarette butts in some containers along with loose marijuana in others, certainly constituted evidence that would justify a belief that Bedell had "prepared" marijuana. As I view this case, the mere fact that the jury might so find, as the majority indicate, was a better reason for not giving appellant's instruction No. 10 than it was for giving it. The marijuana in this case had already been grown and harvested and the manufacturing process by production had been completed before it was placed in the pillowcase and paper bag and stored in the appellant's home. All that was left for the appellant to do was lie in bed and enjoy the fruits of his labor. The cigarette butts found in the jar and the plastic container under appellant's bed, to me, were simply evidence that he had been smoking in bed and had not emptied his ashtrays. Certainly it was no evidence he was manufacturing marijuana by preparation or compounding. It was only evidence that he had harvested some of his marijuana crop and had produced smoke from the marijuana he had grown and harvested.

Apparently the majority feel that unless the appellant smoked the entire marijuana plant, stalk, roots, leaves, seed and all, the jury could have reasonably found he prepared and compounded, and thereby manufactured, the leaves he did smoke. The harvesting of marijuana and stripping the leaves from the stalk could be considered preparation and compounding as easily as rolling a cigarette from the leaves or placing the leaves in a pillowcase or paper bag; consequently, under appellant's instruction No. 10, he could have argued that he only prepared and compounded his entire marijuana crop for his own use.

Now if Bedell had been charged and tried for manufacturing marijuana by the unusual, if not impossible, process of preparation or compounding a controlled substance then,

perhaps, he would have been entitled to the defense that he only prepared and compounded it for his individual use and had not manufactured it within the meaning of § 82-2601 (m), *supra,* but this was not the case. The trial court throughout the trial of this case admitted the marijuana found in the appellant's home to show the chain of title from the fields to the appellant's home and the evidence was limited to that purpose. The appellant did not testify and he offered no evidence as to his intended use of the marijuana found on his farm or in his home.

I would affirm the judgment.

Harris, C.J. and George Rose Smith, J., join this dissent.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. CR 76-77

HOYLE BRUCE BEDELL,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

Opinion Delivered September 20, 1976.

Appeal from Randolph Circuit Court; Harrell Simpson, Judge.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. This is the second appeal in a prosecution for the offense of manufacturing marihuana. The salient facts were stated in the first opinion and need not be repeated. *Bedell v. State,* 257 Ark. 895, 521 S.W. 2d 200 (1975). Upon a second trial Bedell was again convicted and was sentenced to a five-year term and a $2,500 fine. Several points for reversal are argued.

The appellant is mistaken in his argument that the manufacture of a controlled substance for one's own use is not an offense. The personal-use exemption applies only to the preparation or compounding of such a substance. Ark. Stat. Ann. § 82-2601 (m) (Supp. 1975). Manufacture, however, includes production, which in turn includes planting, cultivating, and growing the substance.

§ 82-2601 (u). There is abundant proof that Bedell was growing marihuana on his farm. In fact, he so admitted on the witness stand.

There was no prejudicial error in the procedure by which the State introduced the marihuana plants into evidence. The State's expert witness, Manuel Holcomb, a chemist identified the exhibits as marihuana. His qualifications as a chemist are not questioned. He testified that a chemical analysis is essential in the identification of marihuana. That testimony rebuts the appellant's argument, made without proof, that only a botanist should be permitted to identify the plant. We do not find Holcomb's analysis to have been deficient. He tested at least one of the plants that were taken from the field and visually checked other plants in the same bag. He also tested other specimens of marihuana that were discovered in Bedell's home. There was no defect in the important chain of custody; that is, from the officer's seizure of the plants in the fields to their delivery of the plants to Holcomb. It is true that the exhibits were not kept constantly under lock and key after their use as evidence at the first trial, but that was merely a circumstance to be considered by the jury in weighing the testimony. *Rogers v. State,* 258 Ark. 314, 524 S.W. 2d 227 (1975).

Our ruling upon the first appeal, that the prohibition against unreasonable searches and seizures does not extend to open fields and forested areas, has become the law of the case and will not be re-examined. The doctrine known as the law of the case applies to issues of constitutional law. *Feldman v. State Board of Law Examiners,* 256 Ark. 384, 507 S.W. 2d 508 (1974); *Miller Lbr. Co. v. Floyd,* 169 Ark. 473, 275 S.W. 741 (1925), affirmed, 273 U.S. 672 (1927). Hence it is immaterial that a federal trial court, after our decision upon the first appeal in this case, decided the point

the other way. *United States ex rel. Gedko v. Heer,* 406 F. Supp. 609 (W.D. Wis. 1975). If the appellant thought our first decision to be wrong he had the opportunity to seek a review by the United States Supreme Court.

Affirmed.

We agree. Harris, C.J., and Fogleman and Jones, JJ.

APPENDIX C

State of Arkansas
In the Supreme Court

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 4th day, being the first Monday of October, A.D. 1976, amongst others were the following proceedings, to-wit:

On the 25th day of October, A.D. 1976, a day of said term

Hoyle Bruce Bedell
Appellant

No. CR76-77
vs.
State of Arkansas
Appellee

Appeal from Randolph Circuit Court.

Rehearing denied.